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No. 01-455

In the
Supreme Court of the United States

FRANCONIA ASSOCIATES, *et al.*,
Petitioners,

vs.

UNITED STATES,
Respondent.

GRASS VALLEY TERRACE, *et al.*,
Petitioners,

vs.

UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The government attempts to avoid liability in this case by asking this Court to adopt a number of unprecedented exceptions to well-settled principles of law. With respect to petitioners' contract claims, the government asserts that it should not be held to ordinary principles of contract law insofar as those principles touch upon the statute of limitations under 28 U.S.C. § 2501. With respect to petitioners' takings claims, the government advances a "parasite exception" to the ripeness requirement that would cause certain takings claims to accrue before they become ripe for judicial review. A straightforward application of this Court's precedent, however, demonstrates that petitioners' claims were filed in a timely manner.

I. Petitioners' Contract Claims Accrued When The FmHA Breached By Failing To Perform Its Contractual Obligations.

The major thrust of the government's opposition is that the standards governing the accrual of contract claims in disputes between private parties do not apply in contract actions brought against the government subject to 28 U.S.C. § 2501. Opp. 15-17, 28-30, 33-34. Despite this Court's repeated admonitions that the United States is subject to the same rules as private contractors (*see* Pet. Br. 21), the government asserts that § 2501 provides it refuge from the ordinary contract principles that otherwise would determine when a breach occurred in this case, triggering the statute of limitations on petitioners' claims.

A. Section 2501 Does Not Afford The Government Any Special Treatment With Regard To The Accrual Of Contract Claims Brought Against It.

1. The government first asserts that statutes of limitation applicable to claims against the government must be "strictly construed" because they involve a waiver of sovereign immunity. The bulk of the cases on which it relies

stand only for the proposition that the question *whether* the government has waived its sovereign immunity must be strictly construed. *See* Opp. 15. Here, the government has "unequivocally expressed" through the Tucker Act its consent to be sued for claims such as those before the Court. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980). The government cannot now cloak itself in sovereign immunity, having expressly waived its immunity from suit.

The cases purportedly applying this strict construction standard in the limitations context fare no better. The primary case on which the government relies, *Soriano v. United States*, 352 U.S. 270 (1957) (Opp. 15, 29), was overruled on the very point for which the government cites it. While the Court held in *Soriano* that the doctrine of equitable tolling had no place in suits against the government because of the strict construction given to waivers of sovereign immunity, the Court reversed that holding in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1991). In *Irwin*, the Court held that once the government has waived sovereign immunity, the equitable tolling doctrine should apply against the government "in the same way that it is applicable to private suits." *Id.* at 95.

Both the concurring justices in *Irwin* and subsequent cases have recognized that *Irwin* overruled the strict construction approach applied in *Soriano*. *See Irwin*, 498 U.S. at 98 (White, J., concurring) (noting that the majority had "directly overrule[d]" *Soriano*); *Stevens v. Secretary of the Dep't of Health and Human Svcs.*, 31 Fed. Cl. 12, 22 (1994) (noting that the doctrine set forth in *Soriano* was overruled by *Irwin*); *Glick v. United States*, 25 Cl. Ct. 435, 440 (1992) ("The jurisdictional concept relative to federal limitations statutes [as enunciated in *Soriano*] has been reexamined and modified."). [1] Thus, the current state of the law under *Irwin*

[1] The only other limitations case cited by the government for its "strict construction" rule, *United States v. Kubrick*, 444 U.S. 111 (1979), did not even purport to apply a more strict limitations standard to claims against the government. Rather, the Court simply attempted to discern congressional intent in the statute. *Id.* at 118. In doing so, the Court was mindful that while it should not interpret the government's waiver of immunity more broadly than Congress intended, it also should not "assume the authority to narrow the waiver that Congress intended." *Id.*

is that once the government has waived its immunity, it "stands in the same position as a private party" with respect to statute of limitations principles. *See Massard v. Secretary of the Dep't of Health and Human Svcs.*, 25 Cl. Ct. 421, 424 (1992).

Thus, the government's patchwork "strict construction" argument falls apart upon scrutiny. The case law establishes that limitations periods applicable to suits against the government should be construed in conformity with the standards applicable to private disputes. While the Court should not extend the government's waiver of immunity beyond that intended by Congress, "[n]either should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955) (construing scope of waiver of sovereign immunity under Federal Tort Claims Act in light of the "broad and just purpose" of the statute to hold the government liable "in circumstances like unto those in which a private person would be liable").[2]

2. The government's arguments regarding the legislative history of § 2501 and its use of the word "first" (Opp. 16-17, 28-29) also are unpersuasive. The relevant history demonstrates that Congress intended to make the government answerable to claims against it according to the same limitations principles that apply in disputes between private parties—not to grant it more favorable treatment in that regard. *See* Cong. Globe, 37th Cong., 3rd Sess. 414 (1863)

[2] Even under a strict construction approach, the result would be no different in this case. A strict interpretation of § 2501 would essentially mean that no exceptions to the prescribed limitations period could be implied. *See Soriano*, 352 U.S. at 276. Here, petitioners do not request that the Court carve out any exception from the terms of the statute, but rather seek to have the statute applied according to its terms.

("As this bill proposes to throw open this court to all claimants, I think the same statute of limitations ought to be applied to existing claims as would be applied between private individuals.").[3] Any other interpretation would contravene the very purpose behind the creation of the Court of Claims, which was to ensure that the government would render prompt justice against itself according to the same principles that apply to private parties:[4]

> It is believed also that no better reason exists for exempting the government from prosecution for just claims against it than exists in the case of individuals. Its obligations to pay its debts and perform its contracts is quite as imperative as those which rest upon other parties amenable to the laws.
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> * * *
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> This assumption [that the government should have "special privileges" over individuals in its "legal rights and pecuniary obligations"] ignores entirely the well-settled principle that when the government enters into a contract, or engages in any pecuniary transaction with an individual, it to that extent divests itself of its sovereign character, and assumes that of a private citizen. Its rights, duties, and obligations are to be adjudged and considered in all respects and in all places precisely as if it were a private party; and when it approaches the altar of justice, and submits its rights to the jurisdiction of civil judges, it comes, in all respects, as an ordinary suitor. There is no law for the citizen, in respect to obligations of a pecuniary character, which the government is not bound to observe . . . .

H.R. Rep. No. 513, 36th Cong., 1st Sess. 2, 4-5 (1860).[5]

In addition, both the "first accrued" language and the six-year time period set forth in § 2501 mirrored contemporaneous state statutes of limitation applicable to disputes between private parties. *See* Angell, LIMITATION OF ACTIONS, App. xxxiv-clxxxvi (1876) (quoting state statutes of limitation). If Congress had desired that stricter limitations standards apply to the government under § 2501, it could have chosen a shorter time period or provided specific exceptions to the rules applied in other contexts. Instead, consistent with the rationale for the court's creation, Congress enacted a statute that put claims against the government on the same footing as private disputes.

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[3] The legislative history relied on by the government (*see* Opp. 29) is not to the contrary. The language quoted stresses the importance of ensuring that claims against the government are subject to *a* statute of limitations, but says nothing to indicate that the limitations period prescribed by Congress should be *applied* any differently than other statutes of limitation. *Id.* Further, the debates surrounding the limitations provisions principally focused on concerns about outdated civil war claims. *See* Cong. Rec., 49th Cong., 2nd Sess. 622 (1887). ("The committee was so anxious to exclude any possibility of war claims coming in under this bill, that we provided there should not be asserted under it any claim that had arisen more than six years prior to the time of its assertion. Therefore no claim which arose during the period of hostilities can come in under the bill."); Cong. Globe, 37th Cong., 3rd Sess. 418 (1863) (noting that these "old claims" were not previously subject to even "the ordinary statute of limitations" and "therefore, that it would be dangerous to pass this bill without some limitations, some restraint upon the power of the court over these old claims").

[4] The statute that created the court in 1855 did not even contain a statute of limitations. *See* Act of February 24, 1855, ch. 122, 10 Stat. 612. The court operated and heard cases for eight years before Congress decided in 1863 to add the six-year limitations provision at issue. *See* Act of March 3, 1863, ch. 92, § 10, 12 Stat. 765.

[5] *See also* H.R. Rep. No. 513, 36th Cong., 1st Sess. 2 (1860) ("The different position of the party on the record [*i.e.*, the United States as a defendant] works no change in the law, or in the capacity of the court to do justice . . . ."); H.R. Rep. No. 562, 49th Cong., 1st Sess. 4 (1886) ("It is to be regretted that this Republic of ours should refuse to open its courts to any of its citizens having just demands against the Government. The evils, delays, and injustice of examining and passing upon private claims resulted in the establishment of the Court of Claims to repress a mischief and to advance a remedy."); H.R. Rep. No. 562, 49th Cong., 1st Sess. 2 (1886) ("The citizen who has an honest claim against the Government should not thus be trifled with; it is a mockery of justice.").

There has never been any case applying § 2501 that has attached any significance to the word "first." *See* Williston § 2021A (stating "general rule" that the statute of limitations on a contract claim begins to run when the claim "first accrued"). It is telling that after nearly 150 years of jurisprudence in the Court of Claims, the government cannot point to a single case adopting its theory that the date of "first accrual" under § 2501 is different from the date that a claim against a private party "accrues."[6] Absent any clear expression of Congressional intent to the contrary, the Court should construe § 2501 in conformity with statutes of limitations governing disputes between private parties.[7]

B. A Breach Of Contract Does Not Occur Until The Time For Performance Arrives And The Promissor Fails To Perform As Promised.

No matter how strictly § 2501 is construed, it cannot be understood to mean that a contract claim accrues before a breach occurs. Thus, as the parties appear to agree, the key

[6] It is difficult to imagine that a claim could "first accrue" before it "accrues." The only context in which this difference in terminology might have some relevance is with respect to the tolling of disabilities for successive claimants. *See, e.g., Duke v. Thompson*, 16 Ohio 34, 44 (1847) ("for he is not the person to whom the right of action 'first' accrued. If every grantee of the person to whom the right of action accrues, during disability, were to be entitled to the benefit of the proviso, there might be successive disabilities for several centuries . . . ."). This rationale is consistent with the proviso regarding tolling for disabilities contained in § 2501 as originally enacted, which referred to the claims "of married women first accrued during marriage" and "of persons under the age of twenty-one years first accruing during minority." *See* Act of March 3, 1863, ch. 92, § 10, 12 Stat. 765; *see also* H.R. Rep. No. 562, 49th Cong., 1st Sess. 2 (1886) (expressing concern regarding claims "now prosecuted by the great-grandchildren of the original claimants").

[7] *See Irwin*, 498 U.S. at 95; Angell, LIMITATION OF ACTIONS 13-14 (1876) (despite "slight variations of phrase," statutes of limitation should be given a "uniform construction"); *see also Kubrick*, 444 U.S. at 119 n.6 (finding legislative history of FTCA uninstructive in that it failed to "explain how to determine the date of accrual").

to determining when petitioners' contract claims accrued is identifying the date of breach. *See* Opp. 17. The government asserts that a breach occurred on the day that Congress passed the 1988 legislation because the law "substituted" their contract rights with a "more limited and uncertain" right, thereby "imposing restrictions" on their ability to be freed from the program's regulatory covenants. Opp. 12, 21, 33. In essence, the government contends that petitioners' contract claims accrued when the law placed "fetters" on what it describes as a previously "unfettered" right to prepay. Opp. 18-21. Ordinary principles of contract law, however, dictate that petitioners' claims accrued, not when their rights were restricted or fettered, but when the government breached the contracts by failing to perform. Thus, the relevant inquiry, which the government attempts to obfuscate, is to determine what act constituted a *failure of performance* by the government, resulting in a breach that commenced the statute of limitations on petitioners' claims.

1. A breach of contract claim accrues for limitations purposes on the date of breach.[8] A breach, in turn, occurs only when the promissor fails to *perform* a present contractual duty.[9] As a result, there can be no breach until

[8] Corman, LIMITATION OF ACTIONS § 7.2.1 (1991) ("Corman") ("The cause of action for breach of contract accrues, and the statute of limitations begins to run, at the time of the breach, which consists of failure without legal excuse to perform contractual acts or promises."); Williston, CONTRACTS § 2027B (3d ed. 1978) ("Williston") ("no action on the contract can be maintained until the time when the defendant's performance becomes due according to the terms of his promise; and the Statute should not begin to run until then").

[9] Restatement (Second) of Contracts § 235(2) (1981) ("Restatement") ("breach" requires "non-performance"); Corman § 7.2.1; Williston § 2027B; Corbin, CONTRACTS § 943 (1951) ("Corbin") ("A breach of contract is always a non-performance of duty . . ."); Gifis, LAW DICTIONARY 54 (3d ed. 1991) ("Gifis") (defining "breach" as "a party's failure to perform some contracted-for or agreed-upon act"); Angell, LIMITATION OF ACTIONS 14-15 (1876) ("Angell") (statute of limitations prescribes time period for commencement of action "for the non performance of a contract").

the time for performance under the contract arrives and the promissor fails to perform as promised.[10]

The principle that a contract claim cannot accrue until the time for performance arrives is best illustrated in cases where there exists some condition precedent to the promissor's duty to perform. [11] In such a case, there can be no failure of performance, and thus no breach, unless and until the condition occurs.[12] In cases involving a contractual

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[10] Restatement § 235 cmt. b ("Non-performance is not a breach unless performance is due."); Corbin § 943 ("failure to render the performance promised will not be a breach of contract unless the time fixed for such performance has expired and all conditions precedent have occurred"); Farnsworth, CONTRACTS § 8.8 (1990) ("Farnsworth") ("when performance is due. . . failure to render it is a breach"); Angell at 14-15 ("The difference between the obligation of a contract, and the remedy to enforce it, is that they originate at different times. The obligation to perform is coeval with the making of the contract, and operates anterior to the time of performance. The remedy, on the other hand, cannot be applied to a contract until it is broken; and then it is applied to enforce a pre-existing obligation.").

[11] A condition is "an event, not certain to occur, which must occur . . . before performance under a contract becomes due." Restatement § 224; Farnsworth § 8.2; *see also* Murray, CONTRACTS § 99(B) (1990) ("Murrray") (condition must occur "in order to *activate* an existing contractual duty."); Williston § 663; Corbin, *Conditions in the Law of Contracts*, 28 Yale L.J. 739, 743 (1919); BLACK'S LAW DICTIONARY 288 (7th ed. 1999) (defining "condition" as a "future and uncertain event on which the existence or extent of an obligation or liability depends; an uncertain act or event that triggers or negates a duty to render a promised performance"); Gifis at 87 (defining "condition precedent" as "a fact (act or event) which must exist or occur before a duty of immediate performance of a promise arises").

[12] Farnsworth § 8.2 ("The obligor need not render performance until the occurrence of the event on which the obligor's duty is conditioned."); *id.* § 8.8; Corbin § 943; Wood, LIMITATION OF ACTIONS § 119 at 629-31 (4th ed. 1916) ("the cause of action does not arise until the condition has been accomplished or the precedent act performed.). Where such a condition exists and has not been fulfilled, a cause of action will not accrue even if the plaintiff has suffered damages. *Hermanowski v. Acton Corp.*, 580 F. Supp. 140, 144 (E.D.N.Y. 1983), *aff'd in relevant part*, 729 F.2d 921 (2d Cir. 1984); Williston § 2021A at 698-99, 701 (noting that "a cause of action may not accrue until long after damage has been caused . . . if the law or the

option, for example, the tender of the option by the promissee constitutes a condition precedent to the promissor's duty to perform by accepting the tender.[13] As a result, if the promissee never attempts to exercise the option, no duty of performance on the part of the promissor will ever arise, and no breach of contract will ever occur.

2. Under this indisputable precedent, the enactment of the 1988 legislation could qualify as a breach of contract only if it amounted to a failure by the government to *perform* under the contracts at issue. While the government argues that any breach was complete upon the enactment of the law by Congress, it fails to explain how this legislative act amounted to a "failure to perform." Ignoring the central question of performance, the government focuses on the alleged impact of the restrictions imposed by the law on petitioners' rights. Opp. 19-21, 33. In particular, the government argues that because the legislation's prepayment restrictions allegedly altered petitioners' rights, rendering it less likely that the FmHA would grant any request to prepay, the breach occurred immediately upon the enactment of the law. *Id.*

The government's approach misses the mark. A breach occurred under the contracts at issue not when petitioners' rights were allegedly altered, but when the government failed to perform a present duty of performance. *See supra*

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contract imposes a condition precedent to the right to bring the action and the condition has not been satisfied"); *see also* 2 Bouvier, LAW DICTIONARY 57 (1868) ("The breach of the contract is the gist of the action, and not the damages resulting therefrom.").

[13] Corbin § 638 (identifying "ordinary option contracts" as an example of a contract containing a condition precedent "within the volitional control of the promisee"); *Saewitz v. Epstein*, 6 F.Supp.2d 151, 157 ("the actual exercise of an option contract by the optionee is the performance of a condition precedent to the optionor's duty to perform"); *see also Lucente v. IBM Corp.*, 146 F.Supp.2d 298, 315-16 (S.D.N.Y. 2001) ("date of breach" of option contract was date that defendant "rejected plaintiff's exercise [of the option] and returned the check").

n.9, 10. Having failed to identify any failure of performance that occurred upon enactment of the 1988 legislation, the government cannot assert that the law constituted a breach. Indeed, Congress assumed no performance obligations under petitioners contracts that it could have failed to perform by passing a law. Only the FmHA, the agency with whom petitioners contracted, assumed performance obligations to petitioners. Thus, without some adverse action by the FmHA, the 1988 legislation could not have amounted to a failure by the government to perform as promised. As a result, the passage of the law was not a "breach" that could have triggered the statute of limitations.

3. As petitioners explained in their opening brief, the FmHA's obligation under the subject contracts was to accept prepayment requests submitted by petitioners. Pet. Br. 29-31. Thus, the failure of performance upon which their claims are based is the FmHA's failure to grant their requests to terminate their participation in the Section 515 program. App. 129, 132-33. This failure of performance could not have occurred until each petitioner attempted to prepay. Only then did the time for performance by the agency under each contract arrive. In this manner, the tender of a request to terminate serves as a condition precedent that "activates" the FmHA's obligation to perform its duty of acceptance. *See* Farnsworth, *supra* n.11.

The government no longer contends, as it did before the courts below, that the FmHA had no duty to accept owner requests to prepay. Opp. 35-36.[14] Having admitted that the

[14] In making this admission, the government retreats from the Federal Circuit's holding that the "prepayment provision did not require any performance on the part of the government." App. 10. Although the government now denies that the court of appeals held that the government had no duty to accept termination requests tendered by owners, the language of the Federal Circuit's decision is clear. *Id.* Further, the court's holding affirmed the trial court's finding that:

FmHA did in fact have a contractual obligation to accept requests to prepay, the government cannot escape the conclusion that the time for performance did not arrive, and thus no breach occurred, until each petitioner attempted to terminate its participation in the program and was rejected by the agency. *See* Pet. Br. 29.

4. The government's argument that the legislation amounted to a breach because it "eliminated" petitioners' contract rights also must fail. Indeed, the 1988 legislation did not even attempt to "eliminate" the central right at issue here, *i.e.*, petitioners' right to terminate their participation in the program and thereby gain freedom from the regulatory covenants set forth in their loan agreements. The statute is directed only to the FmHA's authority to accept prepayment requests and requires the agency to grant such requests in specified circumstances. Pet. Br. 11-12. As a result, the agency's promised performance—to release petitioners from the program upon their request—can occur even under the new scheme created by Congress.[15] Thus, the statute cannot possibly be understood to "eliminate" petitioners' rights.

The only right that the government points to as having been "eliminated" by the statute is what it calls an "unfettered right to prepay" (a phrase that find finds no source in petitioners' pleadings). Opp. 12, 18. According to

> no performance by the government is required—it is merely a promise *to allow* the borrower to prepay.... The government's performance, if it can be called that, is to keep its promise *to allow* borrowers an unfettered prepayment right. No further performance was required by the government...." App. 31 (emphasis added).

[15] Thus, the government is simply wrong in asserting that the 1988 legislation "immediately and permanently prevented the FmHA from performing" under the parties' contracts. Opp. 12, 27. To rebut this factual assertion, petitioners have lodged with the Court publicly available documents establishing that in fiscal years 1999 and 2000 alone, hundreds of housing units in the Section 515 program have been released from the program upon the owners' requests. *See* Letter from J. Eckland to D. McNerney (April 4, 2002).

the government, this right was eliminated by the legislation because the restrictions imposed by the law rendered that right no longer "unfettered." Thus, the point of the government's analysis is simply that the legislation fettered, or conditioned, the terms under which the agency would perform its contract obligations. Such an imposition of extra-contractual conditions on the terms of one's future performance, however, is the classic definition of a repudiation, *not* a breach. Pet. Br. 26.

The government again misstates petitioners' pleadings by asserting that the breach of which they complain is the 1988 legislation's imposition of new procedures and conditions on prepayment. Opp. 24-25, n.5. Petitioners never alleged that the mere enactment of the statute or the mere existence of the modified prepayment process constituted a breach.[16] Rather, petitioners' breach claim is premised on the agency's implementation of the statutory conditions to deny their termination requests brought pursuant to the statue. App. 126-29.[17] Thus, it was not the existence of those conditions, but rather the agency's failure of performance through its enforcement of the conditions, that constituted a breach.

C. This Court Has Soundly Rejected The Government's Argument That Legislation Can Never Amount To A Repudiation.

1. The government asserts that legislation could never constitute an anticipatory repudiation of the government's contract obligations. Opp. 12, 23-24, 27. This argument is

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[16] Indeed, in the event that the agency grants a prepayment request under the 1988 legislation, any "breach" based solely on any additional delays or costs caused by the new conditions would be inconsequential and would constitute, at most, an immaterial breach.

[17] Contrary to the government's assertion that petitioners have not alleged that they complied with the 1988 legislation's procedures (Opp. 24-25 n.5), petitioners have pled that they attempted to prepay pursuant to the 1988 legislation and were denied. *See* App. 129 ¶ 41.

disposed of by this Court's decision in *Mobil Oil Exploration & Producing SE, Inc. v. United States*, 530 U.S. 604 (2000). There, the Court held that a statute announcing that the government would no longer honor the terms of lease contracts entered into with oil companies constituted a "repudiation" as defined by the Restatement (Second) of Contracts § 250: "a statement by obligor to the obligee indicating that the obligor will commit a breach." 530 U.S. at 608, 619 ("if legislation passed by Congress and signed by the President is not a 'statement by the obligor,' it is difficult to imagine what would constitute such a statement").

Respondent denies that the Court held that the legislation at issue in *Mobil* constituted a repudiation of the contracts, stating that the decision could be construed as holding that the statute effected an immediate, rather than prospective, breach. Opp. 31. However, one need only read the opinion and the language of the Restatement § 250 to see that the case cannot reasonably be understood as the government suggests. The Court began by explaining the contract principles regarding repudiation and then held that the legislation at issue constituted just such a repudiation under the Restatement. *Id.* at 608, 619-21. Although the Court acknowledged that the government ultimately *may have* breached the contracts, it consistently described the *legislation* as a "repudiation," *i.e.*, a "statement" of the government's "intent" to breach the contracts. *Id.* at 619, 620, 621. The Court's introductory remarks leave no doubt as to its holding: "We agree that the Government broke its promise; it *repudiated* the contracts; and it must give the companies their money back." *Id.* at 607 (emphasis added).

The government also asserts that nothing in *Mobil* turned on whether the statute at issue was an anticipatory repudiation or an actual breach. Opp. 31-32. However, the Court's holding that the legislation at issue constituted a repudiation under the Restatement § 250 was key to its holding that the contractors were entitled to restitution

under Restatement § 373. *Id.* at 608, 624 (holding that restitution is available "upon repudiation"). Indeed, as the government points out, the Court never determined whether the contracts at issue were ever breached. Opp. 32. Thus, unless the Court had determined that the legislation amounted to a repudiation, it would not have had any basis for concluding that "the Government must give the companies their money back." *See* 530 U.S. at 624.

2. The government suggests that the only government action that could qualify as a repudiation would be a statement by an agency official. Opp. 12, 27. Aside from the inconsistency of this argument with *Mobil*, a legislative act possesses all the salient features of a repudiation by a private party. While the government asserts that Acts of Congress differ because they are "unequivocal" (Opp. 27), it is in fact a requirement of the anticipatory repudiation doctrine that the repudiation be "unequivocal." *Dingley v. Oler*, 117 U.S. 490, 502 (1886). Further, while a statute might definitively "preclude performance" (Opp. 27), a repudiation similarly exists where a party "puts it out of his power to perform," rendering performance "impossible." *Taylor v. Johnston*, 539 P.2d 425, 430 (Cal. 1975); Corbin § 984. Finally, a legislative repudiation, just like a repudiation by a private party, can be retracted, as demonstrated by the fact that the government's initial repudiation of the contracts at issue through the 1979 legislation was retracted through the repeal of that law in 1980. *See* Pet. Br. 27.

3. Although the government asserts that the doctrine of anticipatory repudiation is wholly inapplicable to this case, it attempts to enforce a cannibalized version of the doctrine against petitioners. The government asserts that because the doctrine provides that petitioners *could have* sued upon the enactment of the 1988 legislation, their claims *must* be deemed to have accrued at that time. Opp. 21-22. The doctrine of anticipatory repudiation, however, stands as an exception to the general rule that one cannot sue for breach

until an actual breach occurs. It allows the promissee, for policy and economic reasons, to sue before a breach claim has accrued for limitations purposes. Pet. Br. 23, 28 n.32.[18] Indeed, the law recognizes many situations in which a plaintiff can sue before its claim has "accrued" for limitations purposes. As the court held in *Nager Elec. Co. v. United States*, 368 F.2d 847, 857 n.17 (Ct. Cl. 1966), "[t]here is nothing incongruous in a rule that suit *can* (but need not) be filed on an item before the limitation period commences."[19] *See also Kossick v. United States*, 330 F.2d 933, 936 (2d Cir. 1964) ("Courts have long since rejected the mechanical concept that in all cases the limitations period necessarily starts at the very moment that a suit can be brought.").

In addition, the anticipatory repudiation doctrine did not even exist in the United States in 1863 when § 2501 was enacted. The doctrine finds its origin in the English case of *Horchster v. De la Tour*, 118 Eng. Rep. 922 (Q.B. 1853), and did not attain general acceptance in the United States until after the Supreme Court's decision in *Roehm v. Horst*, 178 U.S. 1 (1900), decided nearly forty years after § 2501 was enacted. *See* Rowley, *A Brief History Of Anticipatory Repudiation In American Contract Law*, 69 U. CINN. L. REV. 565 (2001). Thus, the "first accrued" language of § 2501 cannot reasonably be

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[18] Thus, the government attempts to rely on the component of the doctrine that permits a plaintiff to sue upon the repudiation but ignores the component of the doctrine recognizing that the statute of limitations does not *accrue* at that time because no breach has yet occurred. This selective incorporation of the doctrine, if accepted, would undermine its very purpose, which is to provide parties the *option* to file suit before the time for performance has arrived. Pet. Br. 23.

[19] In *Nager*, the court held that although the six-year limitations period on the plaintiff's claim would not begin to run until a mandatory administrative proceeding was completed, the plaintiff was nonetheless permitted to file suit before that time if it so desired. *Id.* (holding that "our rule has been that the time-bar will not fall until six years after the administrative determination, but suit can be filed earlier"). Another example of a situation where a party can file suit before its claim has "accrued" for limitations period is a declaratory judgment action.

construed to require owners to sue upon a repudiation—something that the courts of the United States did not even recognize at the time. The general contract law in existence in 1863 provided that a claim for breach of contract accrues when the breach occurs, which is the precisely rule that petitioners advocate here.

D. The Standard Accrual Principles Advanced By Petitioners Provide Certainty And Are Consistent With The Terms Of The Parties' Agreements.

The government also asserts that the time period within which the government might be subject to liability if petitioners prevail is simply too long and subject to too much discretion by petitioners. Opp. 29-30, 34. However, any such discretion on petitioners' part is a direct result of the terms of the parties' contracts. The contracts granted petitioners the option to prepay "at any time" during their full mortgage terms. Having agreed to perform under a contract containing a forty to fifty-year option provision, the government cannot complain that it might be held liable for breach it if fails to perform at any time during that period.[20]

The government's reliance on *McMahon v. United States*, 342 U.S. 25 (1951) in this regard is misplaced. The Court held in *McMahon* that the accrual of the plaintiff's admiralty action alleging "negligence and unseaworthiness" need not await the plaintiff's compliance with an optional administrative procedure.[21] *Id.* at 25, 27. Thus, the Court concluded

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[20] Indeed, the very nature of an option is that it grants the holder with the authority to decide when it will demand performance under the contract. *See Hermanowski*, 580 F. Supp. at 143; *Fullington v. M. Penn Phillips Co.*, 395 P.2d 124 (Ore. 1964). An option granted by the government should be treated no differently.

[21] Because the plaintiff was not required to begin the administrative process within any particular time frame, the Court observed that a rule delaying the accrual of the plaintiff's action until the administrative process was complete would permit the plaintiff to defer suit indefinitely by simply delaying its submission of an administrative claim. *Id.* at 27.

that the plaintiff's claim accrued upon the date of injury. *Id.* The analogous rule here is that petitioners' claims accrued upon the date of breach, as they allege. Further, there is no optional administrative claims process in this case through which petitioners might attempt to defer the accrual of their claims. Thus, petitioners' claims simply do not present any of the dangers that the Court confronted in *McMahon*.[22]

Finally, contrary to the government's suggestions, the accrual principles advanced by petitioners do provide certainty. Each petitioner's claim accrued when the FmHA failed to perform its contractual obligations and would become time-barred six years thereafter. Permitting Section 515 owners like petitioners to await the time for performance before their claims are deemed to accrue ensures that the only owners who will file suit are those who actually desire to exercise their termination option[23] and have been denied. The government's approach, on the other hand, would compel every Section 515 owner to file suit based on the enactment of the 1988 legislation, regardless of whether or when they might attempt to exercise their option to leave the program and regardless of whether the agency would have permitted them to do so upon their request.

II. Adverse Action By The FmHA Was Also Required For Petitioners' Takings Claims To Accrue.

A. No Court Has Ever Adopted the "Parasite Exception" Advocated By The Government.

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[22] The holding in *McMahon* has also been expressly rejected in contract cases. *See Nager Elec. Co.*, 368 F.2d at 859, 863-65 (specifically rejecting the application of *McMahon* to contract claims subject to mandatory claims process); *see also Friedman v. United States*, 310 F.2d 381 (Ct. Cl. 1962).

[23] In fact, an owner who had no intention of prepaying would have no right to sue based on the 1988 legislation, in that a plaintiff cannot recover in an action for anticipatory repudiation unless it had the "willingness and ability to perform" under the contract had the defendant not repudiated. *See* Corbin § 978; *see also* App. 128 ¶38.

This Court's precedent on the ripeness of as-applied regulatory takings claims is not subject to serious dispute. *See* Pet. Br. 39. For its sole attempt to avoid that precedent, the government devises an exception to the doctrine for takings claims that are "parasitic" of a contract claim. Opp. 35-38. According to the government, the Court should adopt a new rule providing that any takings claim deemed to be parasitic of a contract claim must accrue for limitations purposes on the same date that the contract claim accrued. The government apparently would have this exception apply to all such parasitic takings claims, without regard to whether the claim is yet ripe for judicial review. This would create a potentially huge exception to this Court's takings jurisprudence that would apply in any case where the plaintiff's investment-backed expectations are premised upon representations arguably constituting a contract.

The government's assertion that petitioners' takings claims are nothing more than leeches living off of their contract claims is incorrect and misstates petitioners' pleadings. While petitioners' contract claims are premised on the FmHA's failure to perform according to the terms of the parties' contracts, their takings claims are based on the interference with their real property interests caused by the agency's application of the 1988 legislation, which resulted in the continuation of onerous restrictions on the use of their properties. App. 131. Thus, petitioners do not, as the lower court presumed, assert a taking of their contract rights. As the title owners of their land and buildings, petitioners seek just compensation for the taking of their state-created real estate interests. As a result, petitioners' takings claims are wholly independent from their contract claims. The government's assertions to the contrary are nothing more than premature attacks on the merits of petitioners' claims.

More fundamentally, the question of when a takings claim accrues is governed by a wholly separate analysis from the question of when a contract claim accrues. While a

contract claim accrues on the date of breach, an as-applied takings claim accrues when the agency charged with implementing the statute at issue renders a decision on the application of the law to the property in question. Pet. Br. 39-40. In this case, both claims happened to accrue at the same time, in that the FmHA's rejection of an owner's prepayment request qualifies as both a failure to perform under the contract *and* a final decision on the application of the 1988 legislation.[24] The government's analysis, however, would require courts to ignore the distinctions between the principles governing the accrual of contract and takings claims. Thus, the Court should decline the government's request that it graft a "parasite exception" onto the law regarding the accrual of as-applied takings claims.

B. The Government Would Have The Court Hold That Petitioners' Takings Claims Accrued Before They Became Ripe For Judicial Review.

The law is clear that petitioners' takings claims did not accrue until they ripened through the FmHA's application of the 1988 legislation to their properties. Pet. Br. 39-41. It also goes without saying that a takings claim cannot accrue for limitations purposes until it becomes ripe for judicial review. *Id.* 41 n.43. Tellingly, the government never goes so far as to assert that petitioners' takings claims were ripe on the date that the 1988 legislation was enacted. Instead, it essentially argues that those claims should be deemed to have accrued on that day irrespective of whether they were yet ripe.

Thus, the rule that the government asks the Court to adopt would provide that a takings claim can accrue for

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[24] Thus, contrary to the government's insinuations, there is nothing in petitioners' approach that would require the accrual of both claims to fall on the same date if ordinary principles of law mandated a different accrual date for each claim. Here, for example, any affirmance of the lower court's dismissal of petitioners' contract claims would not require a dismissal of their takings claims unless the government's "parasite exception" were adopted.

limitations purposes before it ripens. If accepted, the government's approach would create judicial inefficiencies and undermine the very purpose of the ripeness doctrine. It would in some cases require courts to take jurisdiction over takings claims while a request concerning the property at issue is still pending before the relevant agency (or perhaps even before the plaintiff has submitted a request). Courts would be required to hear such cases even though the agency's ultimate decision might be to grant the request, thereby eliminating the need for a lawsuit in the first place.

The government also asserts that the ruling below is perfectly consistent with the *Greenbrier v. United States*, 193 F.3d 1348 (Fed. Cir. 1999). Abandoning its arguments before the lower courts, the government now asserts that *Greenbrier* is inapposite because the property rights at issue there were contained in a contract to which the government was not a party. Opp. 39. However, nothing in *Greenbrier* turned on the nature or source of the property right at issue. Rather, the holding was guided by the nature of the legislation, which, like the legislation here, provided an exception authorizing the agency to accept prepayments without restrictions when it determined that there was no longer a need for the housing. *Id.* at 1358; *see* Pet. Br. 42. Thus, the conflicting holdings in *Franconia* and *Grass Valley* aptly demonstrate the extent to which the government has been permitted to assert directly contrary positions in different cases to obtain dismissal of otherwise meritorious claims.

CONCLUSION

For the reasons set forth above and in petitioners' opening brief, this Court should reverse the decisions of the Federal Circuit and direct that it remand petitioners' claims to the Court of Federal Claims to be decided on their merits.

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Respectfully submitted,

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